No. 94-172

In The

Supreme Court of the United States

October Term, 1994

JOHN BRUCE HUBBARD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the petitioner's convictions under 18 U.S.C. § 1001 for knowingly making false statements in documents filed with the bankruptcy court are barred by the so-called "judicial function" exception to § 1001.

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1-19) is reported at 16 F.3d 694.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1994. A timely-filed petition for rehearing (Pet. App. 21-26) was denied on March 30, 1994. (Pet. App. 20). On May 10, 1994, Justice Stevens extended the time within which to file a petition for a writ of certiorari to July 28, 1994. The petition for a writ of certiorari was filed on July 27, 1994 and granted on October 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, Section 6 provides as follows:

> The term "department" means one of the executive departments enumerated in section 1 [now section 101] of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.
>
> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

Title 18, Section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

In 1985, the petitioner filed a petition for bankruptcy under Chapter 7 of the Bankruptcy Code. During the course of the bankruptcy proceedings, a successor trustee filed an amended complaint (J.A. 3-4) and a motion for an order requiring the petitioner to surrender records of his businesses. (J.A. 5-7). The petitioner filed through counsel an answer to the complaint (J.A. 11-12) and a response to the motion. (J.A. 8-10). On the ground that the answer and response were knowingly false, the petitioner was charged in counts five, six and seven of a ten-count indictment with making false statements in violation of 18 U.S.C. § 1001.[1] (J.A. 13-16).

Paragraph three of the successor trustee's motion alleged that in response to a request of the original trustee, the petitioner had failed to surrender requested books and records. (J.A. 6-7).

1. The petitioner was also charged with four counts of bankruptcy fraud in violation of 18 U.S.C. § 152 (Counts 1-4) and three counts of mail fraud in violation of 18 U.S.C. § 1341 (Counts 8-10).

The petitioner's alleged false response, which comprised count five, was as follows: "That in Answer to the allegations contained in Paragraph Three of Trustee's Motion, Debtor denies same for the reason it is untrue. Debtor further states that the original trustee requested records, books, and documents which were delivered to her place of business and from which she photocopied many documents and surrendered the balance of the documents to the Debtor. Debtor further states that at no time has the Trustee nor his agents contacted Debtor or Debtor's attorney and requested the materials alleged to herein." (J.A. 10). Testimony adduced by the Government at the petitioner's criminal trial concerning count five established that after the petitioner had filed the response, the bankruptcy judge entered an order directing the petitioner to turn over documents at which time the petitioner delivered a carton of documents to the successor trustee. Government's Court of Appeals Brief at 14-15.

Counts six and seven were based upon two of the petitioner's denials contained in his answer to the trustee's amended complaint regarding the location of assets. Paragraph 10 of the complaint alleged that a well-drilling machine was stored at a certain address. (J.A. 4). The petitioner's answer to paragraph 10 of the complaint, which comprised count six of the indictment, was as follows: "That in Answer to the allegations contained in Paragraph Ten of Trustee's First Amended Complaint Debtor denies same for the reason it is untrue." (J.A. 12). Paragraph 13 of the complaint alleged that drill bits and a drilling mechanism were at one time being stored on a certain property. (J.A. 4). The petitioner's answer to paragraph 13, which comprised count seven of the indictment, was as follows: "That in Answer to the allegations contained in Paragraph Thirteen of Trustee's First Amended Complaint Debtor denies same for the reason it is untrue." (J.A. 12). At the petitioner's criminal trial, the Government presented testimony with regard to counts six and seven that the petitioner had stored some items at the property.

Government's Court of Appeals Brief at 15-16. The Government also presented evidence that when the petitioner had attempted to insure the well-driller and drill bits approximately one year prior to the filing of his answer, he had represented that the drilling mechanism was then located at the property in question. *Id.*, at 16.

The petitioner was found guilty of all ten counts and was sentenced on counts one through nine to concurrent 24-month terms of incarceration. On count 10, sentence was suspended and the petitioner was placed on probation for five years to commence upon expiration of his prison sentence. On each of the 10 counts, the petitioner was assessed a consecutive fine.

On appeal to the Sixth Circuit, the petitioner challenged the § 1001 convictions on the ground, *inter alia*, that the false statements fell outside the scope of § 1001. In a split opinion, the majority affirmed. *United States v. Hubbard*, 16 F.3d 694 (6th Cir.1994).

ARGUMENT

A.

This case raises the question whether the so-called "judicial function" exception to Title 18, § 1001 bars the convictions of a party to a bankruptcy proceeding for false answers to a complaint and for a false response to a discovery motion. The question calls for a determination of the scope of § 1001's applicability to judicial proceedings which must commence with an examination of the language of the statute. *United States v. Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 2527, 69 L. Ed. 2d 246 (1981). Title 18, § 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The terms "department" and "agency" are defined in Title 18, § 6 which provides as follows:

> The term "department" means one of the executive departments enumerated in section 1 [now section 101] of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.
>
> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

Title 5, § 101 lists as executive departments the Departments of State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education, and Veteran Affairs.

The Reviser's Note to Title 18, § 6 states the following:

> The word "department" appears 57 times in Title 18, U.S.C., 1940 ed., and the word "agency" 14 times. It was considered necessary to define clearly these words in order to avoid possible litigation as to the scope or coverage of a given section containing such words. (See United States v. Germaine, 1878, 99 U.S. 508, 25 L.Ed. 482, for definition of words "department" or "head of department.")

Germaine was cited in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. __, __, 111 S. Ct. 2631, 2642, 115 L. Ed. 2d 764 (1991), wherein the Court noted in pertinent part:

> This Court for more than a century has held that the term "Department" refers only to "'a part or division of the executive government, as the Department of State, or of the Treasury," expressly "creat[ed]" and "give[n] the name of a department" by Congress. *Germaine*, 99 U.S., at 510-11. See also *Burnap [v. United States]*, 252 U.S. [512], at 515, 40 S.Ct. [374], at 376 [64 L.Ed. 692 (1920)] ("The term head of a Department means . . . the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, who is a member of the Cabinet").

The plain language of § 1001 and the definitions of "department" and "agency" unambiguously establish that the statute does not apply to statements made to the courts. Because

"the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *Turkette*, 452 U.S., at 580, 101 S. Ct., at 2527, quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980). Where Congress intends a Title 18 statute concerning "departments" and "agencies" to include "courts" or the "judicial branch" within its ambit, it so provides in the statute. *See, e.g.*, 18 U.S.C. Appendix 2, § 5 ("All courts, departments, agencies, officers, and employees of the United States. . ."); 18 U.S.C. § 203(a)(1), (b)(1) (". . . before any department, agency, court, . . ."); 18 U.S.C. § 666(d)(2) ("the term 'government agency' means a subdivision of the executive, legislative, judicial, or other branch of government, . . ."); 18 U.S.C. § 1030(a)(7) ("the term 'department of the United States' means the legislative or judicial branch of the Government or one of the executive departments enumerated in section 101 of title 5"); 18 U.S.C. § 2515 (". . . before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States,. . ."); 18 U.S.C. § 2518 (10)(a) ("Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States,. . ."); 18 U.S.C. § 2710(d) (". . . in or before any court, grand jury, department, officer, agency,. . ."); 18 U.S.C. § 3504(a) ("In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, . . ."). Accordingly, the petitioner's statements fall outside the ambit of § 1001, having been made within the jurisdiction of a court and not within the jurisdiction of a "department" or "agency" as defined by Congress.

However, in *United States v. Bramblett*, 348 U.S. 503, 509, 75 S. Ct. 504, 508, 99 L. Ed. 594 (1955), this Court stated in *dictum* that the word "department" "was meant to describe the

executive, legislative *and judicial branches of the Government*." (Emphasis supplied). As discussed in greater detail below in "B", the courts of appeals have adhered to *Bramblett*'s *dictum*, often with express misgivings. Indeed, in this case, the Court of Appeals stated that "[a]t first glance, one might be tempted to believe that the plain language of the statute prohibits application of § 1001 to the case at bar" because in "ordinary usage", the terms "department" and "agency" mean the divisions of the executive branch "and not the whole or any divisions of the judicial or legislative branches — Congress is not the Department of Lawmaking, nor is the U.S. Court of Appeals the Appellate Adjudication Agency. And the statutory definitions section of Title 18 [*i.e.*, § 6] seems to support this common sense view." *Hubbard*, 16 F.3d, at 703 n.4. However, the Court of Appeals opined that because *Bramblett* "has instructed us that the 'any department or agency' language of § 1001 is not to be restricted by § 6", it was "necessary to reject Hubbard's plain language argument . . .". *Id.*, at 699.

The case at bar questions *Bramblett*'s conclusions and raises the issue whether *Bramblett*'s holding and/or "dictum, and the Court[s] of Appeals' reliance upon it, cannot be squared with congressional intent, and should be 'recede[d] from' now that the issue . . . is 'squarely presented.' " *NLRB v. Hendricks County Rural Electric Membership Corporation*, 454 U.S. 170, 188, 102 S. Ct. 216, 228, 70 L. Ed. 2d 323 (1981), quoting *NLRB v. Boeing Co.*, 412 U.S. 67, 72, 93 S. Ct. 1952, 1955, 36 L. Ed. 2d 752 (1973).

In *Bramblett*, a former member of Congress was prosecuted under § 1001 for a false representation to the disbursing office of the House of Representatives. In the district court, the defendant challenged the applicability of the statute to the legislative branch. The government argued that the statute was not ambiguous and that Congress intended the statute to apply to all

branches of the Government. The district court reviewed the history of § 1001, Congress' definitions of "department" and "agency", the "significant" Reviser's Notes to 18 U.S.C. § 6 as well as Congress' use of the term "department" in other statutes. *United States v. Bramblett*, 120 F. Supp. 857, 858-864 (D.D.C.1954). Finding the issue to be one of first impression, the district court reasoned that "[i]t seems apparent . . . upon a reading of . . . Section 6 of Title 18 and Section 1 of Title 5, that Congress intended to limit the words 'department or agency' to the executive branches of the Government unless the context shows that such term was intended to include the legislative or judicial branches of the Government." *Bramblett*, 120 F. Supp., at 862. The district court cited other provisions in Title 18 as examples of contexts where Congress intended the terms "department or agency" to describe branches of Government other than the executive. Concluding that there was reasonable doubt as to the scope of § 1001, the district court resolved the doubt in favor of the defendant. *Id.*, at 862-864

On direct appeal by the Government, this Court reversed.[2] The decision, which turned upon a view of the legislative history of the statute contrary to that of the district court, found no evidence in committee reports or debates that the statute was to have a restricted scope. The Court felt that the terms "department or agency" were "apparently" added "to indicate that not all falsifications but only those made to government organs were reached", *Bramblett*, 348 U.S., at 507, 75 S. Ct., at 507, and that the legislative history "dispels the possibility of attaching any significance" to the new phraseology. *Id.*, at 508. With regard to Congress' definitions of "department" and "agency" in 18 U.S.C. § 6, the Court concluded that "[i]t would do violence to the purpose of Congress to limit the section to falsifications made to the executive departments. Congress could not have intended to

2. The Chief Justice and Justices Burton and Harlan did not participate.

leave frauds such as this without penalty." *Bramblett*, 348 U.S. at 509, 75 S. Ct. at 508.

The decision in *Bramblett* is contrary to the plain language of § 1001. In deeming the terms "department or agency" insignificant, the *Bramblett* Court violated the "ancient and sound rule of construction that each word in a statute should, if possible, be given effect." *Crandon v. United States*, 494 U.S. 152, 171, 110 S. Ct. 997, 1000, 108 L. Ed. 2d 132 (1990) (Scalia, J., concurring). From this rule of construction it logically follows that when Congress supplies definitions for statutory words, as is the case here, effect must be given to the definitions as well. In failing to so construe the terms of § 1001, *Bramblett* improperly broadened the scope of the statute beyond its plain language and wrongfully "resort[ed] to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, __ U.S. __, __, 114 S. Ct. 655, 662, 126 L. Ed. 2d 615 (1994).

In any event, the sparse legislative history relied upon in *Bramblett* is hardly conclusive. In fact, it is equally supportive of the contrary conclusion that the statute was not intended to apply to conduct or statements made to the judiciary. "Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon*, 494 U.S., at 160, 110 S. Ct., at 1002. A review of the legislative history of § 1001 reveals that we are not here dealing with that "rare" case, but one which, consistent with providing "fair warning", demands a construction no broader than the terms of the statute itself as well as the definitions of those terms supplied by Congress.

The Act of October 23, 1918, Ch. 194, 40 Stat. 1015, was the first federal criminal statute prohibiting the making of a false statement. *United States v. Yermian*, 468 U.S. 63, 70, 104 S. Ct.

2936, 2940, 82 L. Ed. 2d 53 (1984). The statute provided, *inter alia*, that whoever "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher," etc., shall be punishable by fine or imprisonment or both. In *United States v. Cohn*, 270 U.S. 339, 46 S. Ct. 251, 70 L. Ed. 616 (1926), the Government argued that the terms "with the intent of defrauding" should be broadly construed as intending not merely cheating the Government out of property or money, but also in the sense of interfering with or obstructing a lawful governmental function by deceit and fraud. This Court rejected the Government's broad reading. "[I]f Congress had intended to prohibit all intentional deceit of the Federal Government, it would have used the broad language then employed in 18 U.S.C. Sec. 37, which 'by its specific terms, extends broadly to every conspiracy . . .' with no words of limitation whatsoever." *Yermian*, 468 U.S., at 71, 104 S. Ct., at 2940, quoting *Cohn*, 270 U.S., at 346, 46 S. Ct., at 253.

Under this version of the statute, the Secretary of the Interior felt unable to enforce the provisions of the National Industrial Recovery Act of 1933 which prohibited interstate transportation of "hot oil." Congress therefore passed H.R. 8046, which prohibited the making of false statements "to any matter within the jurisdiction of any department, establishment, administration, agency, office, board, or commission of the United States . . .". President Roosevelt vetoed the bill not only because it was no broader than the 1918 Act, but also because it reduced the penalties. *Yermian*, 468 U.S., at 71, 104 S. Ct., at 2941. "This was hardly the measure needed to increase the protection of federal agencies from the variety of deceptive practices plaguing the New Deal administration." *Id.*

Congress reacted by passing the Act of June 18, 1934, 48 Stat. 996. The 1934 provision was enacted eliminating the "purpose" clauses and penalizing anyone who

> shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations . . . in any matter within the jurisdiction of any department or agency of the United States . . . .[3]

This enactment came "at the urging of some of the newly created regulatory agencies". *United States v. Rodgers*, 466 U.S. 475, 478, 104 S. Ct. 1942, 1945, 80 L. Ed. 2d 492 (1984). There is nothing in the legislative history of the statute that indicates any intention to criminalize statements made in judicial proceedings. To the contrary, the legislative history indicates the terms "department" and "agency" were employed in lieu of language that would have limited application of the statute to matters within the jurisdiction of the Secretary of the Interior, Administrator of the Federal Emergency Administration of Public Works, or Administrator of the Code of Fair Competition for the Petroleum Industry, "so as to cover all the departments." 78 Cong. Rec. 2858-2859 (1934). Congress' driving force was its intent to make the law "applicable to the new operations of the Government", 78 Cong. Rec. 3724 (1934), which obviously would not include the courts. The types of activities in question were far removed from the judiciary. *See* 78 Cong. Rec. 11270 (1934) ("There is nothing which permits us to make an investigation and prosecute persons who are engaged in the 'kick-back' practice. They make false returns, claiming that they

3. The 1934 act proscribed false claims and false statements. In 1948, the false claims provision was codified as 18 U.S.C. § 287 and the false statement provision as 18 U.S.C. § 1001.

paid certain amounts to their employees, when they have not done so. This bill just amends the law so as to give the Federal Government authority to deal with that class of cases."). *See also* S. Rep. No. 1202, 73d Cong., 2d Sess. (1934) (amendment was designed to reach "hot oil" cases, and also cases involving contractors on Public Works Administration projects who falsified certificates as to the wages being paid). As amended, the statute reflected "the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." *United States v. Gilliland*, 312 U.S. 86, 93, 61 S. Ct. 518, 522, 85 L. Ed. 598 (1941).

As previously noted, where Congress has intended a statute which concerns "departments" and "agencies" to be broader than the statutory definitions of 18 U.S.C. § 6, it has so provided. In fact, the phrase "before any department" has been found to express a Congressional intent to *exclude* courts. *See, e.g., United States v. Waldin*, 122 F. Supp. 903 (E.D. Pa. 1954); *United States v. Adams*, 115 F. Supp. 731 (D.N.D. 1953). "That Congress did not include such language, either in the 1934 enactment or in the 1948 revision, provides convincing evidence. . . " that the statute was not intended to reach courts. *Yermian*, 468 U.S., at 72, 104 S. Ct., at 2942. Alternatively, if there has been an intention to include the judiciary, Congress could have enacted the statute "with no words of limitation. . . ". *Yermian*, 468 U.S., at 71, 104 S. Ct., at 2940, quoting *Cohn*, 270 U.S., at 346, 46 S. Ct., at 253. Neither being the case here, the legislative history, at best for the Government, is ambiguous, and at worst for the Government, demonstrates an intent consistent with the statute's express limitation to statements made to "departments" or "agencies" as those terms have been previously defined and commonly understood and as those terms are defined in § 6 of Title 18.

Bramblett was also concerned that "Congress could not have

intended to leave frauds such as this without penalty." *Bramblett*, 348 U.S. at 509, 75 S. Ct. at 508. Such a concern cannot justify a judicial broadening of the scope of a statute for several reasons. First, it is not for the courts to legislate criminal liability where Congress has not, *United States v. Bass*, 404 U.S. 336, 348, 92 S. Ct. 515, 522-523, 30 L. Ed. 2d 488 (1971), and certainly not in the name of statutory construction.

Second, *Bramblett*'s concern is ill-founded because there is no glaring gap in coverage. Congress has provided criminal penalties in Title 18 for acts of fraud or dishonesty committed in judicial proceedings. *See, e.g.*, § 401 (contempt); § 1501 *et seq.* (obstruction of justice); § 1512 (improper influence of official proceeding); § 1621 (perjury); § 1622 (subornation of perjury); § 1623 (false declarations).[4] Additionally, Rule 11 of the Federal

4. This Court has been reluctant to ascribe to Congress an intent to criminalize behavior where the statutory language hints of no such intent and where such behavior is amply addressed elsewhere. For example, in *Williams v. United States*, 458 U.S. 279, 287, 102 S. Ct. 3088, 3093, 73 L. Ed. 2d 767 (1982), this Court stated in pertinent part the following in interpreting § 1014:

> Yet, if Congress really set out to enact a national bad check law in Sec. 1014, it did so with a peculiar choice of language and in an unusually backhanded manner. Federal action was not necessary to interdict the deposit of bad checks, for, as Congress surely knew, fraudulent checking activities already were addressed in comprehensive fashion by state law. [citation omitted] Absent support in the legislative history for the proposition that Sec. 1014 was "designed to have general application to the passing of worthless checks," [citation omitted] we are not prepare to hold petitioner's conduct proscribed by that particular statute.

Thus, here, as was the case in *Williams*, "[t]he legislative history does not demand a broader reading of the statute." 458 U.S., at 288, 102 S. Ct., at 3094.

Rules of Civil Procedure authorizes the impositions of sanctions upon counsel and parties. *See Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991). While it is true that prosecution under § 1001 is not precluded merely because another statute may proscribe the same conduct, *Woodward*, 469 U.S. 105, at 109-110 (1985), the question here is not one of preclusion but of intended scope, *i.e.*, whether § 1001 should apply in the first place. The existence of other and more specific means of policing false pleadings filed by parties during litigation offers additional support to the observation, shared by nearly every court of appeals that has addressed the issue, that "[t]he legislative history [of § 1001] reveals no evidence of an intent to pyramid punishment for offenses covered by another statute as well as by § 1001." *United States v. Masterpol*, 940 F.2d 760 (2d Cir. 1991). *See also United States v. Mayer*, 775 F.2d 1387, 1390 (9th Cir. 1985) (§ 1001 "should not be permitted to swallow up perjury and other federal statutes"); *United States v. Rose*, 570 F.2d 1358, 1363 (9th Cir. 1978) (legislative history reveals no evidence of intent to pyramid); *United States v. Erhardt*, 381 F.2d 173, 175 (6th Cir. 1967) (application of § 1001 to judicial proceedings would undermine the effectiveness of the perjury statute); *Friedman v. United States*, 374 F.2d 363, 367 (8th Cir. 1967) ("a strict application of this statute would remove the time-honored and now necessary formality of requiring witnesses to testify under oath.").[5]

Finally, as discussed in greater detail below, almost

5. Also consistent with this view is the United States Attorneys' Manual which, as noted in *United States v. Deffenbagh*, 957 F.2d 749, 752 (10th Cir. 1992), "provides that '[p]rosecutions should not be brought under 18 U.S.C. § 1001 for false statements submitted in federal court proceedings,' but rather such prosecutions should be under 18 U.S.C. §§ 1503 and 1621." *See* United States Department of Justice, United States Attorney's Manual, § 9-69.267 (1984).

immediately after *Bramblett* was decided, the courts of appeals commenced carving out exceptions to that decision, imposing various restrictions upon the applicability of § 1001 to judicial proceedings. Those restrictions have been in place for more than three decades during which time Congress has taken no action to repudiate them. If the limitless scope of § 1001 suggested by the Government were intended by Congress, one might reasonably have expected during this substantial period of time some Congressional response to the restrictions in the form of amendment to the statute to expressly include the judicial branch.

Even assuming, *arguendo*, that the term "department" includes the judiciary, the conclusion that § 1001 was not intended to reach documents such as those filed by the petitioner is, at the very least, equally plausible, as evidenced by the failure of any circuit to have held that § 1001 applies to documents filed by a party in the course of litigation under circumstances such as those in the case at bar. The "time-honored interpretive guideline" that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity", *Dowling*, 473 U.S., at 228, 105 S. Ct., at 3139, quoting *Liparota v. United States*, 471 U.S. 419, 427, 105 S. Ct. 2004, 2089 (1985), quoting in turn *Rewis v. United States*, 401 U.S. 808, 812, 91 S. Ct. 1056, 1059, 28 L. Ed. 2d 493 (1971), warrants adoption of the narrower construction. "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222, 73 S. Ct. 227, 229, 97 L. Ed. 260 (1952), quoted in *Dowling*, 473 U.S., at 214, 105 S. Ct., at 3131, in *Williams*, 458 U.S., at 286, 102 S. Ct., at 3094, and in *Bass*, 404 U.S., at 347, 92 S. Ct., at 522.

This principle advances two policies: "first, 'a fair warning should be given to the world in a language that the common world

will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so fair as possible the line should be clear.' *McBoyle v. United States*, 283 U.S. 25, 27, 51 S. Ct. 340, 341, 75 L. Ed. 816 (1931) (Holmes, J.)." *Bass*, 404 U.S., at 348, 92 S. Ct., at 522. *See also United States v. Cardiff*, 344 U.S. 174, 73 S. Ct. 189, 97 L.Ed. 200 (1952); *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37 (1820). Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. "This policy embodies the 'instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.' H. Friendly Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967)." *Bass*, 404 U.S., at 348, 92 S. Ct., at 522-523. It is probably fair to say that most members of the bar would be startled to learn that a false denial contained in an answer to a complaint filed in a federal court subjects the maker to criminal liability under § 1001. Of course, that fact alone would obviously not be dispositive of the scope of § 1001. However, it is certainly significant that for the past sixty years, there has been no signal from the Congress or the courts to the contrary and consequently no "fair warning" that such conduct has been marked for criminal prosecution.

Allowing § 1001 prosecutions in connection with litigation and discovery poses grave potential for abuse. The Tenth Circuit expressed its concern on this matter in *Deffenbagh, supra,* in the context of a discovery subpoena issued in connection with a grand jury probe. The defendant was charged with a § 1001 violation upon the allegation that he did not supply all of the documents requested. The Court of Appeals stated:

> We are also reluctant to allow the Justice Department, which apparently initiated the discovery subpoena, the power to prosecute

> under § 1001 persons who allegedly did not comply completely. There is considerable room for error or misunderstanding in compliance with subpoenas duces tecum. Parties considering discovery requests in any litigation situation, including grand jury proceedings, often will interpret such commands narrowly. To give the Department of Justice power to prosecute allegedly false statements under Sec. 1001 in connection with a form affidavit of compliance with a subpoena would give the government a more powerful weapon than we believe Congress intended.

Deffenbagh, 957 F.2d, at 754.[6] The same considerations apply to the preliminary stages of litigation where parties have yet to undertake investigations or frame all of the issues but are operating under the pressures of time constraints and procedural requirements imposed by the applicable court rules.[7]

Because 1001 has not "plainly and unmistakably" rendered

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6. The testimony relied upon by the Government to convict the petitioner for his discovery response that he was not in possession of the requested documents established that the petitioner did turn over the documents in response to an order of the bankruptcy judge. This is precisely the type of dispute which can give rise to "considerable room for error or misunderstanding in compliance", *Deffenbagh*, 957 F.2d, at 754, and is ill-suited to resolution via criminal prosecution.

7. Subjecting all pleadings filed in federal litigation to the possibility of criminal liability under § 1001 could have other farreaching consequences. Prevailing parties, especially those in hotly contested matters or those who are vindictive, will be encouraged to refer for prosecution the losing parties or their counsel for having made "statements" that could be deemed "false" or for having "concealed" or "covered up".

filings in litigation such as the petitioner's subject to criminal punishment, *Bass*, 404 U.S., at 348, 92 S. Ct., at 522, and because the "text, structure and history fail to establish that the Government's position is unambiguously correct", *United States v. Granderson*, __ U.S. __, 114 S. Ct. 1259, 1267, 127 L. Ed. 2d 611 (1994), the petitioner's § 1001 convictions are invalid.

B.

Even if § 1001 applies to judicial proceedings, virtually all of the courts of appeals have concluded that the statute is not without some limitations in the judicial arena. However, in the various applications of § 1001 addressed and/or approved by this Court, none to date has involved statements made in court. *See, e.g., Yermian, supra* (false statements to employer eventually submitted to federal agency); *Rodgers, supra* (false statement to FBI and Secret Service that wife had been kidnapped and that she was involved in a plot to assassinate the president); *United States v. Knox*, 396 U.S. 77, 90 S. Ct. 363, 24 L. Ed. 2d 275 (1969) (false wagering registration form filed with Internal Revenue Service); *Bryson v. United States*, 396 U.S. 64, 90 S. Ct. 355, 24 L. Ed. 2d 264 (1969) (affidavit filed with National Labor Relations Board falsely denying affiliation with Communist Party); *United States v. Bramblett, supra* (statement to disbursing office of House of Representatives); *United States v. Gilliland, supra* (false reports filed with Secretary of Interior concerning amount of petroleum produced from certain wells).

The application of § 1001 to judicial proceedings was touched upon by this Court in *Rodgers*. In that case, the defendant claimed that his allegedly false statements to the FBI and Secret Service were not matters "within the jurisdiction" of the respective agencies as that language is used in § 1001. The District Court granted Rodgers' motion to dismiss and the Eighth Circuit affirmed, finding itself bound by its prior decision in

Friedman v. United States, supra. Resolving a conflict among the circuits, this Court reversed, ruling *inter alia*, that the term "jurisdiction" as used in § 1001 did not admit of the constricted construction adopted by the Court of Appeals. In footnote four of the opinion in *Rodgers*, this Court responded as follows to the Eighth Circuit's concern in *Friedman* about the adverse effect a literal construction of § 1001 could have upon the taking of oaths in courts:

> The Eighth Circuit also expressed concern that a literal application of the statute would obviate the taking of oaths in judicial proceedings. "Since the Judiciary is an agency of the United States Government, a strict application of this statute would remove the time-honored and now necessary formality of requiring witnesses to testify under oath." *Friedman v. United States*, 374 F.2d, at 367. Several courts faced with that question have in fact held that § 1001 does not reach false statements made under oath in a court of law. See, *e.g.*, *United States v. Abrahams*, 604 F.2d 386 (CA5 1979); *United States v. D'Amato*, 507 F.2d 26 (CA2 1974) (holding limited to private civil actions); *United States v. Erhardt*, 381 F.2d 173 (CA6 1967) (per curiam). But they have mostly relied, not on a restricted construction of the term "jurisdiction," but rather on the phrase "department or agency." These courts have held that, although the federal judiciary is a "department or agency" within the meaning of § 1001 with respect to its housekeeping or administrative functions, the judicial proceedings themselves do not so qualify.

> *Abrahams, supra*, at 392-393; *Erhardt, supra*, at 175. See also *Morgan v. United States*, 114 U.S.App.D.C. 13, 16, 309 F.2d 234, 237 (D.C.Cir.1962), cert. denied, 373 U.S. 917, 83 S.Ct. 1306, 10 L. Ed. 2d 416 (1963). We express no opinion on the validity of this line of cases.

The decision of the District of Columbia Circuit in *Morgan* is credited as having given rise to what came to be known as the "judicial function" or "adjudicative function" exception to § 1001. In *Morgan*, the defendant was convicted under § 1001 for falsely representing to a court that he was a licensed attorney. On appeal, the defendant argued that § 1001 was inapplicable because his conduct did not involve a "matter within the jurisdiction of any department or agency of the United States" but rather involved a matter within the jurisdiction of a court. In finding § 1001 applicable to the defendant's conduct, Judge Bazelon, writing for the Court of Appeals, reluctantly followed the *Bramblett dictum* as follows:

> Were we examining the statute without the benefit of prior Supreme Court construction, perhaps we would agree with appellant that Congress did not intend it to apply to courts (especially in light of 18 U.S.C. § 6 which states that the term "department" means "one of the executive departments * * * unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government"). But the Supreme Court has explicitly stated, in *Bramblett* . . . that the "context" of § 1001 "calls for an unrestricted interpretation" and that the word "'department,' as used in this

> context, was meant to describe the executive, legislative *and judicial branches of Government.*"

Morgan, 309 F.2d, at 237 (emphasis by the court), quoting *Bramblett*, 348 U.S., at 509, 75 S. Ct., at 508. Morgan went on to note, however, that § 1001 was not without any limitations. In discussing whether, within the meaning of § 1001, a defendant "covers up" a material fact when he pleads not guilty, or whether an attorney violates § 1001 when he moves to exclude hearsay testimony he knows to be true, or whether a summation on behalf of a client counsel knows to be guilty also violates § 1001, the *Morgan* court, in *dictum*, stated the following:

> We are certain that neither Congress nor the Supreme Court intended to include traditional trial tactics within the statutory terms 'conceals or covers up.' We hold only, on the authority of the Supreme Court construction, that the statute does apply to the type of action with which appellant was charged, action which essentially involved the 'administrative' or 'housekeeping' functions, not the 'judicial' machinery of the court.

Morgan, 309 F.2d, at 237. The distinction drawn in *Morgan* between the adjudicative and administrative functions of the courts gained approval in several circuits. *See, e.g., United States v. Masterpol*, 940 F.2d 760 (2d Cir.1991); *United States v. Holmes*, 840 F.2d 246 (4th Cir.), *cert. denied*, 488 U.S. 831, 109 S. Ct. 87, 102 L. Ed. 2d 63 (1988); *United States v. Lawson*, 809 F.2d 1514 (11th Cir.1987); *United States v. Abrahams*, *supra*; *United States v. Erhardt*, *supra*. If *Morgan* and its progeny are correct, the petitioner's statements clearly fall outside the ambit

of § 1001 whether viewed as constituting "traditional trial tactics" or concerning the "judicial" machinery of the court.

(1)

The phrase "traditional trial tactics" was apparently coined in *Morgan* in response to the absurd and unjust results which could flow from a literal application of § 1001. The defendant in *Morgan* suggested that § 1001 would apply, if not subject to some limitations, to traditional criminal trial practices such as a guilty defendant's plea of not guilty, or a motion to suppress evidence, or a summation to a jury. In concluding that § 1001 could not be read as punishing such "traditional trial tactics", *Morgan* is consistent with well-settled rules of statutory construction.

As noted in *In re Chapman*, 166 U.S. 661, 667, 17 S. Ct. 677, 680, 41 L. Ed. 1154 (1897), "nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion". Chief Justice Hughes in *Sorrells v. United States*, 287 U.S. 435, 450, 53 S.Ct. 210, 216, 77 L.Ed. 413 (1932) amplified upon this maxim as follows: "To construe statutes so as to avoid absurd or glaringly unjust results, foreign to legislative purpose, is, as we have seen, a traditional and appropriate function of the courts." It is both unjust and absurd that a statute should be read as subjecting to criminal prosecution the federal criminal trial practices of pleading not guilty, moving to suppress or exclude evidence and presenting summations to juries where the statute admits to an alternative reading. Additionally, these federal criminal trial practices implicate constitutional guarantees such as the presumption of innocence, the privilege against self-incrimination and the right to effective assistance of counsel. Consequently, a literal application of § 1001 must be avoided for the additional reason that "every reasonable construction must be resorted to, in order

to save a statute from unconstitutionality." *Chapman v. United States*, 500 U.S. 453, 464, 111 S. Ct. 1919, 1927, 114 L. Ed. 2d 524 (1991), quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 1397, 99 L. Ed. 2d 645 (1988).

The Solicitor General has argued in its brief on jurisdiction that a plea of not guilty is distinguishable from the petitioner's statements in that the former falls outside the purview of § 1001 "because it is not a statement of fact, but rather a formal notice of nonacquiescence." Brief for the United States at 8. But a denial made in response to an allegation contained in a complaint is no less a "formal notice of "nonacquiescence". In fact, it has been long understood that an entire cause of action can be "put at issue by a general denial", *United States v. McCoy*, 193 U.S. 593, 597, 24 S. Ct. 528, 530, 48 L. Ed. 805 (1904), and that a general denial will "put the plaintiff upon proof of every fact necessary to constitute the cause of action set out in his petition. . . ". *County of Nemaha v. Frank*, 120 U.S. 41, 45, 7 S. Ct. 395, 397, 30 L. Ed. 584 (1887). *See also United States v. American Tobacco Co.*, 166 U.S. 468, 470, 17 S. Ct. 619, 620, 41 L. Ed. 1081 (1897) (noting that the "usual general denial of all the allegations of the petition was filed by the attorney general on behalf of the United States. . . ."); *United States v. Weld*, 127 U.S. 51, 53, 8 S. Ct. 1000, 1001, 32 L. Ed. 62 (1888) ("The answer of the United States consisted of a general denial of all the material allegations in claimant's petition. . . .").

"The general denial has 'deep roots' in both common law and code pleading practice." *United States v. Minissee*, 113 F.R.D. 121, 122 (S.D. Ohio 1986), citing 5 Wright & Miller, *Federal Practice and Procedure* § 1265, citing in turn Shipman, *Common-Law Pleading* (3d ed. 1923) § 169, and Clark, *Code Pleading* (2d ed. 1947), § 92. To this day, general denials are permitted under Rule 8(b) of the Federal Rules of Civil

Procedure. While it is true that a general denial must be made "in good faith" and is subject to the obligations of Rule 11, Rule 8(b)

> does not contemplate an elaborate reply to every allegation of a complaint. It does not bind a defendant to his, her, or its responses for all time. It does not even condemn averments of insufficient information or knowledge upon which to form a belief as to the truth of the complainant's allegations. The rules governing responsive pleadings require merely that an answer be sufficiently particular to inform the plaintiff what defenses he, she, or it will be called upon to meet.

White v. Smith, 91 F.R.D. 607, 608 (W.D.N.Y.1981).[8] Even though the petitioner's denials and his discovery response were more specific than general denials, they nevertheless were denials subject to further investigation, proof and judicial fact-finding. Thus, the same considerations apply.

Under the government's view of § 1001, traditional trial practices would be subject to revolutionary change. The specter of criminal prosecution would hang over every document filed and every word spoken in the federal judicial system. Attorneys would not be immune. They would have to be concerned about being charged as principals under § 1001, aiders and abettors under 18 U.S.C. § 2, or coconspirators under 18 U.S.C. § 371. "We do not assume that Congress, in passing laws, intended such

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8. Under the Government's claimed scope of § 1001, the filing of the general denial by the assistant attorney general in *White v. Smith, supra*, would arguably constitute a crime because it was knowingly false. Criminal charges in such cases are an absurdity. The district judge in *White* found the threat of Rule 11 sanctions sufficient.

results." *United States v. X-Citement Video, Inc.*,__ U.S. __, __ (1994). Of course it is true that vigorous advocacy does not entail "knowing falsification" or "lying to the court". Brief for the United States at 8-9. But the chilling effect which would result from the Government's position cannot be ignored. *See Mayer*, 775 F.2d, at 1389 ("In reading *Morgan*, we sense a concern that applying § 1001 to positions taken before a court during litigation could inhibit vigorous advocacy of parties' interests, particularly those of a defendant in a criminal case."). At the very least, every step of the pleading stage would require burdensome prophylactic measures such as written and oral warnings and disclaimers. *See Crandon*, 494 U.S., at 177-178, 110 S. Ct., at 1011 (Scalia, J., concurring) ("Any responsible lawyer advising on whether particular conduct violates a criminal statute will obviously err in the direction of inclusion rather than exclusion . . .".) Nothing in the language of § 1001, its legislative history, its predecessor statutes, or its interpretation, has suggested the need for or the applicability of criminal sanctions in the realm of procedural filings in civil and criminal litigation.

In *Yermian, supra*, a sharply divided Court held that proof of actual knowledge of federal agency jurisdiction is not required to obtain a conviction under § 1001. After tracing the evolution of the statute, the dissenting opinion reached the following conclusion:

> Of course "[i]t is not unprecedented for Congress to enact [such] stringent legislation," *United States v. Feola*, 420 U.S. 671, 709, 95 S.Ct. 1255, 1276, 43 L.Ed.2d 451 (STEWART, J., dissenting). But I cannot subscribe to the Court's interpretation of this statute in such a way as to "make a surprisingly broad range of unremarkable conduct a violation of federal law," *Williams v. United States*, 458 U.S. 279, 286, 102 S.Ct. 3088, 3093, 73 L.Ed.2d 767 (1982), when the legislative history simply "fails to evidence congressional awareness of the statute's claimed scope." *Id.*, at 290, 102 S.Ct., at 290.

United States v. Yermian, 468 U.S., at 82-3, 104 S. Ct., at 2946-47 (Rehnquist, C.J., dissenting). The scope of § 1001 claimed here by the Government far exceeds that advanced in *Yermian*.

Because Morgan's interpretation that § 1001 excludes criminal liability for traditional trial practices is appropriate to avoid unjust and absurd results[9], and because the petitioner's filings fall within such practices, the § 1001 convictions should be vacated.

(2)

Under *Morgan* and its progeny, the petitioner's statements also fall outside the scope of § 1001 as implicating the

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9. Another absurdity which would flow from the Government's interpretation is that a false unsworn statement in a bankruptcy proceeding would warrant conviction and incarceration even though such a statement is insufficient to bar discharge. *In re Kunec*, 27 B.R. 670 (M.D. Pa. 1982), citing 11 U.S.C. § 727. This anomaly is one of the results of the inconsistency between an expansion of § 1001 and the present bankruptcy statutory scheme which places great significance upon and attaches severe penalties to falsehoods made under oath. Under 18 U.S.C. § 152, bankruptcy crimes include the making of a false oath or account, the use or presentation of a false claim, the giving or receiving of money for acting or forbearing to act, and the withholding from an officer of the estate entitlement to possession of books and records relating to the debtor's financial affairs. For these and other reasons, the decision of the Court of Appeals in the case at bar has been characterized as a "result to be avoided if the current balance of laws and status of the bankruptcy courts are to be maintained." Collier on Bankruptcy, 7A.03 at 7A-140 (15th ed.1994).

"adjudicative" as opposed to the "administrative" or "housekeeping" functions of the bankruptcy court. This so-called "judicial function" exception represents a narrow but salutary limitation upon an overly expansive, unintended and unforeseeable interpretation of § 1001.

That the petitioner's statements involved the "judicial" as opposed to the "administrative" or "housekeeping" functions of the bankruptcy court appears to be without controversy. The statements were made during the course of litigation and were, essentially, "an extension of the defendant's trial itself." *Masterpol*, 940 F.2d, at 766, quoting *Mayer*, 775 F.2d, at 1391-92. The controversy is over whether the distinction between the functions is warranted in the first place. The Government criticizes the distinction between the two functions as "elusive", and argues that the courts of appeal are not always consistent in their decisions on the issue. Brief for the United States at 7. Even if the Government is correct, it does not follow that the exception is ill-founded. In fact, inconsistencies are a likely result of the necessarily fact-specific inquiry into whether conduct falls within the adjudicative or administrative function. Such a determination requires a case by case approach which "often may be a close question". *United States v. Holmes*, 840 F.2d at 248. As with most close questions, reasonable persons may differ as to the appropriate outcome. But here, as was the case in *Holmes*, determining which function applies "is not challenging." *Id.* The petitioner's statements clearly fall within the "adjudicative" function.[10]

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10. Several courts of appeals have addressed the exception with regard to false statements made during criminal proceedings. Comparing the decisions finding an adjudicative function, *see, e.g., Masterpol, supra*, 940 F.2d at 764-65 (defendant's submission of false letter of recommendation to sentencing judge falls within adjudicative function); *Mayer, supra* (same as *Masterpol*); *Abrahams, supra* (defendant's false statements to magistrate during removal hearing fall within adjudicative function); *Erhardt, supra*
(Cont'd)

There are additional reasons not to abandon the judicial function exception. Since it was first suggested in 1962 in *Morgan*, "there has been no response on the part of Congress either repudiating the limitation or refining it. It therefore seems too late in the day to hold that no exception exists." *Mayer*, 775 F.2d, at 1390. *Accord United States v. Wood*, 6 F.3d 692, 695 (10th Cir. 1993); *Masterpol*, 940 F.2d, at 766. Although congressional silence in the face of judicial statutory interpretation is not necessarily indicative of legislative acceptance of the interpretation, the passage of more than three decades since *Morgan* without any sign of disapproval from Congress provides additional grounds against dismantling the exception.

In the case at bar, the Court of Appeals "decline[d] to adopt the judicial function exception", *Hubbard*, 16 F.3d, at 701, for four reasons. "First, the Supreme Court in *Bramblett* said that § 1001 was to be read broadly and *Bramblett* never indicated that there might be such a thing as a judicial function exception." *Id.* But in expounding a broad reading, this Court never approved a limitless one. Moreover, it is precisely because the statute is couched in broad terms that the courts must be careful to ensure that reasonable limits are observed. And while it is true that *Bramblett* did not announce a judicial function exception to § 1001, it is also true that the issue was not squarely presented. It is just as easily said, and just as significant, that *Bramblett* did not proscribe a judicial function exception.

(Cont'd)
(defendant's submission of false receipt as evidence during criminal proceeding falls within adjudicative function), with those finding an administrative function, *see, e.g., United States v. Barber*, 881 F.2d 345 (7th Cir. 1989) (even if exception were valid, false information sent to judge to influence sentencing of third party violated statute), *cert. denied*, 495 U.S. 922, 110 S. Ct. 1956, 109 L. Ed. 2d 318 (1990); and *Holmes, supra* (defendant's falsification of standardized consent forms falls within administrative function), it is evident that even if the petitioner's statements were made in criminal proceedings, the adjudicative function would apply.

The next reason given by the Court of Appeals is as follows: "Second, we agree with the *Poindexter* court [*United States v. Poindexter*, 951 F.2d 369 (D.C. Cir.1991)] . . . that the judicial function exception does not rest on solid ground." *Hubbard*, 16 F.3d, at 701. The answer to this argument requires consideration of the decision in *Poindexter*.

In *Poindexter*, the Court of Appeals was asked to carve out a legislative function exception to § 1001. In revisiting its decision in *Morgan*, the Court of Appeals stated the following:

> The judicial function exception traces to a dictum in *Morgan v. United States*, 309 F.2d 234 (D.C.Cir.1962), the holding of which is that § 1001 does apply to one who practiced law by "falsely [holding] himself out to be" another person and member of the bar. *Id.* at 235, 237. We relied upon Supreme Court precedent to conclude that a court could be a "department" for purposes of § 1001, but also cautioned that the Congress did not intend that the statute apply to "traditional trial tactics." *Id.* at 237 (citing *Bramblett*, 348 U.S. at 509, 75 S.Ct. at 508). We viewed the acts charged, however, as involving the court's "administrative" or "housekeeping" functions, rather than the "judicial" machinery of the court. *Id.*

Id., at 386. In refusing to carve out a legislative function exception to § 1001, it is true that the Court of Appeals in *Poindexter* declined to extend *Morgan*, doubting that its rationale governing "traditional trial tactics" would "shield[] from criminal responsibility a defendant who knowingly makes a material false statement of fact in a judicial proceeding." *Id.*, at

387. The Court of Appeals did note, however, that *Morgan* and the opinions of other circuits were concerned that the terms "'conceals or covers up' not be applied to sanction 'traditional trial tactics' ", *id.*, at 387, citing as an example *United States v. Mayer, supra*.

The problem with *Poindexter* is the conflict between its suggestion that *Morgan* might not prohibit § 1001 prosecution for false statements made in judicial proceedings and its recognition of the widespread concern that § 1001 not be used to punish traditional trial tactics. The proper resolution of that conflict is not through a broadening of the scope of § 1001 by the courts. And the concern over the punishment of such statements vests exclusively with Congress. Because the judicial function exception both advances the express scope of § 1001 and avoids absurd and unjust results, it does, contrary to the Court of Appeal's characterization of *Poindexter*, rest upon solid legal ground.

Third, the Court of Appeals noted that "if we were to believe a limitation should be placed on § 1001 so that it did not overlap the purpose and scope of the federal perjury statute, this would not be the case in which to do it; none of the false statements here was made under oath". *Hubbard*, 16 F.3d, at 701. But the concern about § 1001's relationship to perjury is not one of overlap, but rather, as previously noted, that its "strict application ... would remove the time-honored and now necessary formality of requiring witnesses to testify under oath." *Friedman v. United States*, 374 F.2d, at 367. Moreover, overlap exists anyway because unsworn false statements are punishable under statutes other than perjury.[11]

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11. *See, e.g.*, 18 U.S.C. §§ 401 (contempt); 1501 *et seq.* (obstruction of justice); 1512 (improper influence of official proceeding). *See also* Rule 11 of the Federal Rules of Civil Procedure. Additionally, in the context of bankruptcy proceedings, the knowing and fraudulent making of a false oath or

(Cont'd)

As its last reason, the Court of Appeals stated that it read this Court's decision in *Rodgers* as "cautioning against an automatic acceptance" of the exception. *Hubbard*, 16 F.3d, at 701. "[W]e will instead wait for the Supreme Court to tell us there is such an exception before approving it for use in this Circuit." *Id.* The petitioner obviously hopes that the Court of Appeals' wait is over.

The Court of Appeals also declined to apply *United States v. D'Amato*, 507 F.2d 26 (2d Cir. 1974). In *D'Amato*, the Second Circuit reversed a § 1001 conviction for the filing of a false affidavit during a civil action in federal court to which the government was not a party. *D'Amato* noted that § 1001 has never been applied to a false statement in a private civil action "where the Government is involved only by way of a court deciding a matter in which the Government or its agencies are not involved." *Id.*, at 28. Analyzing the statute's legislative history as interpreted in *Bramblett* and *Gilliland*, the Second Circuit in *D'Amato* found no support for the Government's expansive view that the statute applies to all false statements made in the courts. Rather, the legislative history indicated to the *D'Amato* court that the applicability of § 1001 often turned upon whether the false statement in question was intended to deceive the government or its agencies. However, in the private civil action at issue in *D'Amato*, the court observed that there was neither a fraud upon the Government nor a deception upon an investigative or regulatory agency. In rejecting the Government's view that the mere involvement of a court renders § 1001 applicable, the *D'Amato* court drew from the distinction *Morgan* found between administrative and judicial court functions, agreeing therefrom

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(Cont'd)
account in connection with a bankruptcy case is sufficient to bar a debtor's discharge. 11 U.S.C. § 727(a)(4)(A). In bankruptcy proceedings, deliberate omissions by the debtor in schedules or statements of financial affairs or sworn testimony may also result in the denial of discharge. *See In re Chalik*, 748 F.2d 616 (11th Cir. 1984) and cases cited.

that § 1001 was never intended to apply to every statement made before a federal court.

In *Masterpol, supra*, the Second Circuit applied the rationale of *D'Amato* to reject a theory of prosecution that the defendant had defrauded the government as court, not the government as prosecutor. The court found that the "government offers no reason why that holding [in *D'Amato*] should not apply with equal force to a federal court hearing a criminal matter; nor can we envision any." *Masterpol*, 940 F.2d, at 765.

In *United States v. London*, 714 F.2d 1558 (11th Cir.1983), the Eleventh Circuit also voiced agreement with *D'Amato*, refusing to apply § 1001 to the falsification of a district court order in private civil litigation intended to defraud the attorney's clients. Subsequently in *United States v. Lawson*, 809 F.2d 1514 (11th Cir. 1987), the Eleventh Circuit held that the defendant's production of false documents in a state court action brought by a city housing authority constituted a § 1001 violation where the housing authority was the agent of the United States Department of Housing and Urban Development and the defendant was attempting to improperly extract money which would have been authorized under HUD's contract. The court distinguished *D'Amato* and *London* as not involving attempts to deceive the government.

In the case at bar, the Court of Appeals opined that *D'Amato* was "distinguishable from the case at bar." *Hubbard*, 16 F.3d, at 702. But the Court of Appeals did not explain how the case was distinguishable, instead stating the following: "Without focusing on the distinguishing features, however, we simply hold that to the extent that *D'Amato* is similar enough to be controlling on this issue were this case being heard in the Second Circuit, we decline to follow it in the Sixth Circuit." *Id.* Oddly enough, however, the Court of Appeals stated that the "*London* holding seems sound",

but found that case distinguishable on the ground that "the attorney never made any fraudulent statement to the court or to the opposing party in any court document or proceeding." *Id.*

The rationale of *D'Amato* applies with equal if not greater force to the case at bar. The bankruptcy proceeding constitutes a private civil action. As in *D'Amato,* the Government was not a party. The only involvement of "Government" was in the sense that the bankruptcy court was involved. Moreover, the petitioner's responses to the trustee were not responses to a government official. "The [bankruptcy] trustee is the representative of the debtor's estate, not an arm of the Government. . .". *California State Board of Equalization v. Sierra Summit*, 490 U.S. 844, 845, 109 S. Ct. 2228, 2230, 104 L. Ed. 2d 910 (1989). The *London* rationale is, of course, the same. And the Court of Appeal's distinction of *London* is unsound because the petitioner's statements similarly were not made to the court. The fact that the petitioner's statements were made to the trustee does not, as previously noted, constitute a statement to the Government.

CONCLUSION

For these reasons, the judgment of the Sixth Circuit should be vacated and the cause remanded with instructions to vacate the petitioner's § 1001 convictions.

Respectfully submitted,

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RESPONDENT'S

BRIEF

(6)

No. 94-172

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOHN BRUCE HUBBARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Court's grant of certiorari is limited to the following question:

Whether petitioner's convictions under 18 U.S.C. 1001 for knowingly making false statements in pleadings filed with the bankruptcy court are barred by the so-called "judicial function" exception to Section 1001.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 16 F.3d 694.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1994. A petition for rehearing was denied on March 30, 1994. Pet. App. 20. On May 10, 1994, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including July 28, 1994. The petition for a writ of certiorari was filed on July 27, 1994, and granted on October 31, 1994, limited to the question framed by the Court. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1001 of Title 18 of the United States Code provides as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 6 of Title 18 provides in relevant part as follows:

> As used in this Title:
>
> The term "department" means one of the executive departments enumerated in section [101] of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on four counts of bankruptcy fraud (Counts 1-4), in violation of 18 U.S.C. 152; three counts of making false statements in a matter within the jurisdiction of a federal department or agency (Counts 5-7), in violation of 18 U.S.C. 1001; and three counts of mail fraud (Counts 8-10), in violation of 18 U.S.C. 1341. He was sentenced to concurrent terms of 24 months' imprisonment on Counts 1 through 9, and to a consecutive term of five years' supervised release on Count 10. The court of appeals affirmed. Pet. App. 1-19.

1. On September 25, 1985, petitioner filed a voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code. In December 1985, believing that petitioner had provided false information, the trustee filed a complaint under 11 U.S.C. 727 to prevent petitioner from discharging his debts through the bankruptcy. 2/1/91 (Morning) Tr. 87. In July 1985, a successor trustee filed an amended complaint, after being informed that petitioner had failed to disclose certain property that he owned or possessed. Pet. App. 2; 2/4/91 Tr. 15-19. The amended complaint alleged, among other things, that a well-drilling machine was stored at petitioner's residence and that parts to the machine were stored in a nearby warehouse. J.A. 4. In petitioner's answer, he denied each allegation "for the reason [that] it is untrue." J.A. 12; Pet. App. 4.

The trustee filed, in addition, a motion to compel petitioner to surrender the books and records of his businesses, alleging that "despite requests of the Trustee, the Debtor has refused to surrender all books, documents, records and papers relating to property of the Estate to the Trustee." J.A. 6-7; Pet. App. 2. Petitioner filed a response denying the allegation and asserting that he had produced the requested documents to the previous bankruptcy trustee. J.A. 10; Pet. App. 4.

2. On July 5, 1990, a grand jury returned an indictment against petitioner charging him with bankruptcy fraud, mail fraud, and making false statements in a matter within the jurisdiction of the federal bankruptcy court. Pet. App. 2. The false statement counts were based on the statements made by petitioner in his response to the trustee's motion to

compel and in his answer to the trustee's amended complaint. J.A. 14-16; Pet. App. 4.

The evidence at trial showed that when petitioner filed his answer, he knew that the well-drilling machine and machine parts were stored at the locations specified in the amended complaint. GX 21B; 2/4/91 Tr. 102-103; J.A. 15-16. The evidence also demonstrated that petitioner had not produced the requested books and records either to the original or to the successor trustee, as he had claimed in response to the motion to compel. 2/1/91 (Morning) Tr. 75-76, 79-80, 90-91, 94; 2/4/91 Tr. 9.[1]

3. On appeal, petitioner argued that he had been improperly convicted on Counts 5-7 because, among other things, Section 1001 does not apply to false statements made to a court when the court is exercising its judicial functions. The court of appeals rejected that contention. It recognized, initially, that this Court held in *United States* v. *Bramblett*, 348 U.S. 503 (1955), that the term "department," as used in Section 1001, is meant to describe all three branches of government. Pet. App. 7-8. The court of appeals acknowledged that several other courts of appeals distinguish the courts' administrative role from their judicial role, and carve out from the scope of Section 1001 false statements made to courts when they are exercising judicial functions. Pet. App. 9-10. The court concluded, however, that the "judicial function" exception is inconsistent with *Bramblett*'s teaching that Section 1001 is to be read broadly, and, after reviewing the underpinnings of the exception, held

[1] Petitioner did not surrender the books and records of the estate until well after he had filed his opposition, and then only in response to a direct order by the bankruptcy court. 2/4/91 Tr. 9, 14-17.

that it "does not rest on solid legal ground." Pet. App. 13; see also *id.* at 11 n.5.

In refusing to apply a "judicial function" exception to Section 1001, the court of appeals declined to follow its previous decision in *United States* v. *Erhardt*, 381 F.2d 173 (6th Cir. 1967) (per curiam) (holding that Section 1001 does not apply to the introduction of false documents in a criminal proceeding). *Erhardt* had reasoned that application of Section 1001 in that setting would undermine the safeguard provided by the two-witness rule in perjury prosecutions. The court of appeals explained, however, that *Erhardt*'s rationale "has been significantly weakened, if not entirely undercut, by the abolition of the two-witness rule." Pet. App. 12 & n.6; see 18 U.S.C. 1623(e). The court further observed that "if we were to believe a limitation should be placed on § 1001 so that it did not overlap the purpose and scope of the federal perjury statute, this would not be the case in which to do it; none of the false statements here was made under oath and therefore none could be prosecuted as perjury." Pet. App. 13.[2]

SUMMARY OF ARGUMENT

I. The federal false statement statute, 18 U.S.C. 1001, proscribes the making of a false statement "in any matter within the jurisdiction of any department or agency of the United States." In *United States* v.

[2] Judge Nelson dissented from the court's affirmance of petitioner's conviction on Counts 5-7. Pet. App. 18-19. In his view, *Erhardt* held broadly that Section 1001 "does not apply to conduct engaged in by the defendant in connection with the operation of a court's judicial machinery." Pet. App. 19 (internal quotation marks omitted). Because petitioner's false statements were made in an adjudicative context, Judge Nelson believed that *Erhardt* controlled and precluded petitioner's conviction. *Ibid.*

Bramblett, 348 U.S. 503 (1955), this Court rejected the argument that Section 1001 applies only to false statements made to executive agencies, and held that the term "department" refers to all three branches of the federal government. Although *Bramblett* involved a false statement to Congress, the Court's rationale expressly included the Judicial Branch, and the courts have since understood *Bramblett*'s holding to encompass false statements made to the judiciary. In his petition for certiorari, petitioner did not suggest otherwise, but claimed only that Section 1001 did not apply to the "judicial" (as opposed to the "administrative") functions of the courts. In his merits brief, however, petitioner now asserts that "department," as used in Section 1001, wholly excludes the Judicial Branch. Because that claim was not raised in the petition for certiorari, this Court should not address it. If the Court does address the claim, it should reject it.

Petitioner offers no special justification (other than his contrary view of the merits) for this Court to reconsider *Bramblett*. Although petitioner claims that his interpretation reflects a better reading of the text and history of Section 1001, the arguments that he now raises were raised by the appellee and correctly rejected by this Court in *Bramblett*. Section 1001 is, and was intended to be, a broad, catch-all provision that permissibly overlaps and fills the gaps between more specific prohibitions. It would be anomalous for this Court to hold that Congress intended to prohibit false statements to the executive and the legislature, but to countenance knowing lies to the courts.

II. There is no basis for the so-called "judicial function" exception to Section 1001. The text of the statute does not exclude false statements that implicate the core function of the Judicial Branch—the

adjudication of cases and controversies. Rather, that text and other indicia of legislative intent indicate that Section 1001 covers all authorized functions of government departments and agencies, including, as applied to the courts, their adjudicative functions. Nor is there any justification in policy for precluding the application of Section 1001 to false statements made in the context of adjudication. It should come as no surprise to participants in the judicial process that the knowing and willful falsification of material facts is subject to criminal penalties. The application of Section 1001 to such false statements does not undermine the ability of lawyers and parties to engage in traditional trial tactics, because those tactics have never included the knowing and willful making of false statements of fact. And the inconsistent manner in which courts have applied the "judicial function" exception underscores that, absent a sound basis in the text of the statute, courts should not fashion an exclusion from criminal liability under Section 1001 based on perceived policy concerns.

ARGUMENT

I. SECTION 1001 APPLIES TO FALSE STATEMENTS MADE IN MATTERS WITHIN THE JURISDICTION OF THE JUDICIAL BRANCH

In *United States* v. *Bramblett*, 348 U.S. 503, 509 (1955), this Court construed the term "department" in Section 1001 to encompass all three branches of government. Petitioner contends that *Bramblett* is in error and that the term "department" means only the executive departments listed in 5 U.S.C. 101. Because petitioner failed to raise that claim in his petition for certiorari, this Court need not address it. If the Court does reach the issue, however, the question is not whether (as a matter of first impression) the term "department" should be construed

to include the Judicial Branch, but whether the Court's construction of Section 1001 in *Bramblett* should be reconsidered. In our view, not only does *Bramblett* represent a sound interpretation of the statute, but there is no justification for this Court to revisit this issue of statutory construction that the Court resolved nearly 40 years ago.

A. *Bramblett* Applied Section 1001 To All Three Branches of Government

In *Bramblett*, a former member of Congress was charged with violating Section 1001 by falsely representing to the Disbursing Office of the House of Representatives that a certain woman was entitled to compensation as his official clerk. The issue before the Court was whether the Legislative Branch qualified as a "department" within the meaning of Section 1001. The six Justices who participated in the case unanimously concluded that, in the context of Section 1001, "department" includes the Executive, Legislative, and Judicial Branches. 348 U.S. at 509.

The Court noted that, as defined by 18 U.S.C. 6, the term "department" in Title 18 means one of the executive departments enumerated in Section 1 (now Section 101) of Title 5, "unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government." 348 U.S. at 508. In the Court's view, "[t]he context in which ['department'] is used [in Section 1001] calls for an unrestricted interpretation." *Id.* at 509. After a detailed review of the language, purpose, and history of Section 1001, the Court concluded that

> [i]t would do violence to the purpose of Congress to limit [Section 1001] to falsifications made to the executive departments. Congress could not have intended to leave frauds such as this without penalty. The development, scope and purpose of the section shows that "*department*," *as used in this context, was meant to describe the executive, legislative, and judicial branches of the Government.*

348 U.S. at 509 (emphasis added).

The statement in *Bramblett* that the term "department" covers the Judicial Branch was, in a formal sense, dictum, since the defendant had been charged with making a false statement to the Legislative Branch. But the overarching rationale of the Court's holding—that Section 1001 contains no restriction as to government component—does not allow for any distinction among the three branches. The Court did not conclude that the Legislative Branch qualifies as a "department" because of any characteristic unique to the Legislative Branch, and nothing in the text or history of the statute indicates that Congress would have wanted to proscribe the conduct of the former congressman in *Bramblett* while leaving unpunished an identical false statement by a judicial employee to a court disbursing office.

Since *Bramblett*, every court of appeals that has addressed the issue, even those adopting the "judicial function" exception, has agreed that Section 1001 applies to at least some false statements made within the jurisdiction of the Judicial Branch. *United States* v. *Masterpol*, 940 F.2d 760, 764 (2d Cir. 1991); *United States* v. *Poindexter*, 951 F.2d 369, 386-387 (D.C. Cir. 1991), cert. denied, 113 S. Ct. 656 (1992); *United States* v. *Barber*, 881 F.2d 345, 349-350 (7th Cir. 1989), cert. denied, 495 U.S. 922 (1990); *United States* v. *Holmes*, 840 F.2d 246, 248 (4th Cir.), cert. denied, 488 U.S. 831 (1988); *United States* v. *Mayer*, 775 F.2d 1387, 1388-1392 (9th Cir. 1985); *United States* v. *Lawson*, 809 F.2d 1514, 1518-1520 (11th Cir.

1987); *United States* v. *Abrahams*, 604 F.2d 386, 392 (5th Cir. 1979); *United States* v. *Erhardt*, 381 F.2d 173, 175 (6th Cir. 1967).

B. There Is No Reason For This Court To Reconsider *Bramblett*'s Construction Of Section 1001

In his petition for certiorari, petitioner accepted that Section 1001 applies to false statements made to the Judicial Branch, and argued only that the statute's application in that context is subject to a "judicial function" exception; *i.e.*, that Section 1001 proscribes false statements made to a court only when the court is acting in an administrative capacity. Neither in his questions presented nor in the text of his petition did he suggest that Section 1001 has no application at all to the Judicial Branch. Petitioner now contends, however, that *Bramblett* was wrongly decided, and he urges this Court to overrule that precedent or restrict it to its facts. Pet. Br. 4-19. Those contentions should be rejected.

1. This Court ordinarily will consider "[o]nly the questions set forth in the petition, or fairly included therein." *Caspari* v. *Bohlen*, 114 S. Ct. 948, 952 (1994) (quoting Sup. Ct. R. 14.1(a)); see also *General Talking Pictures Corp.* v. *Western Elec. Co.*, 304 U.S. 175, 179 (1938) ("One having obtained a writ of certiorari to review specified questions is not entitled here to obtain decision on any other issue."). While that limitation is not jurisdictional, *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991), and this Court has the power to consider an issue "antecedent to * * * and ultimately dispositive of the dispute before it, even an issue the parties fail to identify and brief," *United States Nat'l Bank* v. *Independent Ins. Agents of America, Inc.*, 113 S. Ct. 2173, 2178 (1993), the limitation serves valuable

purposes. The bar to raising new questions at the merits stage enables respondents to frame their reasons for opposing certiorari in a clear and concise manner and preserves the Court's ability to allocate its scarce resources in deciding whether to grant certiorari. *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1533 (1992).[3] Accordingly, the Court will consider issues first raised in a merits brief "only in the most exceptional cases." *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425, 427 (1993) (per curiam); see also *Berkemer* v. *McCarty*, 468 U.S. 420, 443 n.38 (1984).

This is not an exceptional case. Although the application of Section 1001 to the Judicial Branch presents an antecedent issue of statutory construction, the Court need not (and does not) explore all antecedent statutory issues before reaching the question on which it has granted review. For example, the Court held in *Kamen* v. *Kemper Fin. Servs., Inc.*, *supra*, that the demand requirement in a derivative action arising under Section 20(a) of the Investment Company Act of 1940 may be excused by futility, without "address[ing] the question whether [Section] 20(a) creates a shareholder cause of

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[3] This case illustrates the care with which respondents and this Court focus upon the questions presented in a petition for certiorari. Petitioner sought review of three distinct questions. The government opposed certiorari on two of those questions, but supported petitioner's request that the Court review the validity of the so-called "judicial function" exception. The Court granted the petition, but only as to the "judicial function" exception issue, and the Court reformulated the question presented with respect to that issue in order to frame it more precisely. Had petitioner argued in his petition that *Bramblett* should be reconsidered, the government and the Court could each have addressed that contention at the petition stage, which would likely have conserved significant resources.

action, either direct or derivative." 500 U.S. at 97 n.4. It is particularly unnecessary to reach the antecedent issue that petitioner seeks to raise in violation of the Court's rules, because that issue was decided by this Court years ago in *Bramblett*, it has not provoked a conflict in the circuits, and petitioner does not present an argument addressed to this Court's standards for overturning a statutory precedent. A petitioner seeking to challenge a precedent of this Court should at least be required to raise the issue in his request for this Court's review.

2. Although petitioner suggests that this Court need not overrule *Bramblett* to conclude that Section 1001 does not cover the Judicial Branch, Pet. Br. 8, he does not identify any principled distinction between the statute's application to Congress and its application to the judiciary. Nor does he explain how *Bramblett* could be confined to its facts—a false statement made to the Legislative Branch—without producing the anomalous consequence that criminal defendants may continue to be convicted under an interpretation of Section 1001 that the Court has implicitly suggested is incorrect. Accordingly, a decision declining to apply Section 1001 to the Judicial Branch is tantamount to repudiating *Bramblett*'s rationale—that the word "department" embraces all three branches. A determination to reconsider that rationale deserves the same consideration that this Court applies when it is asked to overrule a direct holding. See, *e.g.*, *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 733-736 (1977) (recognizing that an attack on the principle underlying a decision requires a determination whether to adhere to that decision as a precedent).

Petitioner has not attempted to carry the heavy burden of showing that the statutory holding of *Bramblett* should be reconsidered. Nor could petitioner

demonstrate that *Bramblett* should be revisited under this Court's traditional standards for the application of *stare decisis* in a statutory case. See *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 171-174 (1989); see also *Hilton* v. *South Carolina Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991); *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 & n.34 (1986); *Illinois Brick*, 431 U.S. at 736.

3. In applying *stare decisis*, the Court has considered whether (1) the earlier decision failed to take account of the relevant language and legislative history; (2) intervening legal developments have removed or weakened the underpinnings of the prior decision; (3) the precedent stands as an obstacle to the coherence or consistency of the law; or (4) the precedent is outdated and inconsistent with current conceptions of justice or the social welfare. *Patterson*, 491 U.S. at 171-175. None of those circumstances exists with respect to this Court's holding in *Bramblett*.

a. Petitioner claims (Pet. Br. 6-15) that the text and the legislative history of Section 1001 support his interpretation of the statute. He raises no issues, however, that were not raised and correctly rejected by the Court in *Bramblett*. The appellee in *Bramblett* contended—as petitioner does here—that the language of Section 1001 and the definition of "department" and "agency" in 18 U.S.C. 6 limit the application of the false statement proscription to the Executive Branch; the appellee also asserted that Congress's identification of the Legislative Branch elsewhere in Title 18 argues against interpreting Section 1001 to refer to the legislature sub silentio. See Brief for Appellee at 4-13, *United States* v. *Bramblett*, 348 U.S. 503 (1955) (No. 159) [hereinafter *Bramblett* Appellee Br.]. This Court rejected those arguments, concluding that it would be

unreasonable, in the context of Section 1001, to presume that Congress intended to proscribe only falsifications made to executive agencies. 348 U.S. at 509.

None of petitioner's textual arguments casts doubt on the Court's decision in *Bramblett*. Contrary to petitioner's understanding, Pet. Br. 6, the term "department" does not unambiguously exclude the Legislative and Judicial Branches. Section 6 of Title 18 expressly provides that, depending on the context in which it is used, the term "department" may describe any of the three branches of government. Moreover, the three branches have long been referred to as "departments" of government. See, *e.g.*, The Federalist Nos. 46-50 (James Madison) (Cooke ed. 1961); *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) ("[T]he treaty addresses itself to the political, not the judicial department."); *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 500 (1867) ("The Congress is the legislative department of the government; the President is the executive department[;] [n]either can be restrained in its action by the judicial department.").[4]

Petitioner suggests (Pet. Br. 7) that because Congress has separately referred to "courts" and

[4] Petitioner's reliance (Pet. Br. 6) on *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), is misplaced. The Court in *Freytag* discussed the meaning of the term "Department" in the context of the Appointments Clause of the Constitution. See *id.* at 885-888. As this Court explained in *United States* v. *Germaine*, 99 U.S. 508, 510 (1878), because the Appointments Clause "is * * * found in the article relating to the Executive, * * * the word as there used has reference to the subdivision of the power of the Executive into departments." The Court's conclusions respecting the use of "department" in that context are not relevant to the meaning of the term in distinct statutory settings. See *NationsBank* v. *Variable Annuity Life Ins. Co.*, Nos. 93-1612 & 93-1613 (Jan. 18, 1995), slip op. 10.

"departments" in some sections of Title 18, Congress must have viewed the word "department" as meaning only the "executive department." He concludes that because Congress did not specifically refer to "courts" in Section 1001, it must have intended to exclude them. That argument, again, is foreclosed by 18 U.S.C. 6, which expressly states that "department" may refer to any of the three branches of government if the context so indicates. While Congress did not specifically state whether "department," as used in Section 1001, includes all branches or merely the executive departments, the Court in *Bramblett* found that exclusion of the Legislative and Judicial Branches would, in the context of Section 1001, create unintended anomalies. 348 U.S. at 509. For example, under petitioner's interpretation, a false statement to an executive procurement office would be proscribed, while an identical falsehood to a congressional or judicial procurement office would go unpunished, even though the effect on the Treasury would be the same. Similarly, a false statement in an agency adjudication would be covered, but an identical false statement in an Article III proceeding or a congressional hearing would not. Those results are sufficiently anomalous to suggest that "department," as used in the context of Section 1001, reaches beyond the Executive Branch. See *Rowland* v. *California Men's Colony*, 113 S. Ct. 716, 720 (1993) (finding the "context" caveat "help[ful] * * * in the awkward case where [the specific statutory definition] seems not to fit").

As this Court explained in *Bramblett*, the conclusion that the context of Section 1001 requires a broad reading of the term "department" is bolstered by the statute's evolution. The Court observed that the earliest predecessor to Section 1001 covered false claims "against any component of the Government," and that none of the

four amendments made to the statute between 1863 and 1934 "restrict[ed] the scope of the false statements provision to the executive branch." 348 U.S. at 505-506. While a statute's "context" may not ordinarily include its legislative history, see *Rowland*, 113 S. Ct. at 720 (construing the Dictionary Act, 1 U.S.C. 1), that principle does not justify revisiting what this Court has already determined to be Congress's actual intent. Congress did not enact a general definition of the term "department" in 18 U.S.C. 6 until 1948—more than a decade after the phrase "in any matter within the jurisdiction of any department or agency" was added to Section 1001. Act of June 18, 1934, ch. 587, 48 Stat. 996. Congress's codification of a general definition of "department" in 1948 could not have influenced Congress in 1934 when it inserted the "department or agency" clause into the statute.

Petitioner argues that *Bramblett* misread Congress's motivation for adding the word "department" to Section 1001 in 1934. The appellee in *Bramblett*, however, also argued that the sole purpose of the 1934 revisions to Section 1001 was to permit prosecution of false claims made to specific New Deal agencies and that the term "department" introduced in that legislation should therefore not be read to extend beyond the Executive Branch. Compare *Bramblett* Appellee Br. 19-21 with Pet. Br. 12-13. This Court took a contrary view, finding that nothing in the 1934 legislation "suggest[ed] that the new phrase was to be interpreted so that only falsifications made to executive agencies would be reached." 348 U.S. at 507. Since *Bramblett*, the Court has relied on that decision's analysis of the legislative history in reaffirming that "[t]he jurisdictional language was added to [Section 1001] solely to limit the reach of the false statements statute to matters of federal interest."

United States v. *Yermian*, 468 U.S. 63, 74 (1984); see also *United States* v. *Rodgers*, 466 U.S. 475, 481 (1984) (quoting *Bramblett*'s analysis of the 1934 amendment).[5]

Finally, petitioner (Pet. Br. 16-17), like the appellee in *Bramblett*, urges this Court to apply the principle of lenity. *Bramblett* Appellee Br. 21-25. The Court in *Bramblett* rejected that argument, holding that the rule of lenity "does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature." 348 U.S. at 510. Petitioner offers no reason why that issue should be decided any differently today. Moreover, petitioner cannot credibly argue in *Bramblett*'s wake that he (or anyone else) lacked notice that Section 1001 applies to false statements made to the judiciary.[6]

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[5] As the Court explained in *Yermian*, the predecessor to Section 1001 had required proof of specific intent to cause pecuniary or property loss to the United States. 468 U.S. at 70-71, citing *United States* v. *Cohn*, 270 U.S. 339, 346-347 (1926). When Congress amended the false statements provision in 1934 to delete that requirement, "the current jurisdictional phrase was necessary to ensure that application of the federal prohibition remained limited to issues of federal concern." *Yermian*, 468 U.S. at 74, citing *Bramblett*, 348 U.S. at 507-508.

[6] Petitioner contends (Pet. Br. 17) that "most members of the bar would be startled to learn that a false denial contained in an answer to a complaint filed in a federal court subjects the maker to criminal liability under § 1001." The statute does not penalize mere falsity, however. It reaches only false statements of fact made willfully and with knowledge of the falsity. *Bryson* v. *United States*, 396 U.S. 64, 69 (1969); *United States* v. *Yermian*, 468 U.S. at 64. Most members of the bar would presumably not be surprised to learn that it is a crime under Section 1001 knowingly to make false statements of fact in formal pleadings in a court of law.

b. No intervening development in the law has undermined this Court's holding in *Bramblett*. Congress did amend the statute in 1934 in response to *United States* v. *Cohn*, 270 U.S. 339 (1926), which had narrowed its application, see *United States* v. *Yermian*, 468 U.S. at 70-71, but Congress has never revised Section 1001 in response to *Bramblett*.[7] And, as we have noted, this Court has twice reaffirmed the rationale of that decision. See *United States* v. *Rodgers*, 466 U.S. at 481-482 (Section 1001 encompasses criminal investigations by federal law enforcement agencies; relying on *Bramblett* for the proposition that Congress's insertion in 1934 of the "in any matter" clause did not "[restrict] the scope of the statute * * * in *any* way"); *United States* v. *Yermian*, 468 U.S. at 74 (Section 1001 does not require proof that the defendant made the false statement with knowledge of federal agency jurisdiction; reaffirming *Bramblett*'s understanding that Congress added the "in any matter" clause solely to fill in the gap

[7] Petitioner argues (Pet. Br. 15-16) that the lack of congressional response to the lower courts' adoption of the "judicial function" exception suggests that Congress does not intend Section 1001 to apply to the Judicial Branch. Congress's failure to respond to lower court decisions, however, cannot create an exception to a statute that has no textual basis. Cf. *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991). And, here, the claim of legislative acquiescence is particularly weak because of the relatively recent vintage of the "judicial function" exception. The exception was not suggested until 1962 and was not adopted by any court until *United States* v. *Erhardt*, 381 F.2d 173 (6th Cir. 1967); before 1979, it was recognized by only two courts of appeals; and it gained a significant following only since the mid-1980s. See note 10, *infra*. In any event, the "judicial function" notion does not suggest that Section 1001 has no application to the judiciary, as petitioner argues; rather, it suggests that there is *an exception* to Section 1001's application to the courts.

left when it deleted language requiring a purpose to defraud the government).

c. *Bramblett* does not conflict with the surrounding body of criminal law. Petitioner points to specific prohibitions in Title 18 against litigation-related crimes that can be committed through false statements to the courts (*e.g.*, contempt, fraud, obstruction of justice), and contends that the existence of those specific prohibitions weighs against interpreting the more general false statement provision of Section 1001 to reach the same conduct. Pet. Br. 14-15. Section 1001 does overlap with numerous statutes that apply to judicial proceedings, but that overlap does not mean that Section 1001 is inapplicable to the courts. Section 1001 also overlaps with numerous statutes that proscribe false statements to executive agencies, see, *e.g.*, 18 U.S.C. 1010 (false statements to Department of Housing and Urban Development and Federal Housing Administration); 18 U.S.C. 1020 (false statements to Secretary of Transportation); 18 U.S.C. 1026 (false statements to Secretary of Agriculture), but those statutes have never been read to mean that Section 1001 is inapplicable to the specified executive agencies. Section 1001 serves as a broad catch-all provision, which overlaps and fills the gaps between more specific statutory prohibitions.[8] As petitioner concedes, Pet. Br. 15, prosecution under Section 1001 is permissible even when it directly overlaps a more specific provision. See *United States* v. *Batchelder*, 442 U.S. 114, 123-124 (1979) (recognizing that a course of conduct may violate more than one criminal

[8] See *Reform of the Federal Criminal Laws: Hearings on S. 1 and S. 1400 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. Pt. 10, at 7477 (1974).

statute and that the government may prosecute under any applicable provision).[9]

It is also irrelevant whether the unsworn falsehood on which this prosecution is based would have provided cause to bar petitioner's discharge in bankruptcy. Pet. Br. 27 n.9. Section 1001 has independent force, regardless of the consequences a particular misstatement may have under other statutory provisions. See *United States* v. *Rodgers*, 466 U.S. at 482-483 (rejecting argument that Section 1001 should not apply to false statements made to FBI agents because Congress could not have intended to impose greater penalties for false unsworn statements under Section 1001 than the penalties imposed for false statements under oath by 18 U.S.C. 1621); *United States* v. *Gilliland*, 312 U.S. 86, 95 (1941). We note, moreover, that contrary to petitioner's understanding, his fraudulent concealment of assets and books and records of the bankruptcy estate did provide a sufficient basis to prevent his discharge. See 11 U.S.C. 727(a)(2)-(4).

d. Finally, the holding in *Bramblett* is not inconsistent with current notions of justice. Petitioner argues (Pet. Br. 17-18) that application of the false

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[9] As petitioner notes (Br. 15 n.5), the United States Attorneys' Manual indicates that federal prosecutors should bring false affidavit cases under 18 U.S.C. 1503 or 1621, rather than under 18 U.S.C. 1001. U.S. Attorneys' Manual ¶ 9-69.267. That recommendation, however, is logical in light of the Manual's recognition elsewhere that "[s]everal courts have viewed the application of 18 U.S.C. § 1001 to the judicial branch more narrowly than *Bramblett* suggests." U.S. Attorneys' Manual ¶ 9-42.145 (referring to cases adopting "judicial function" exception). In any event, the Department of Justice's description of its prosecution policy does not constitute a binding construction of the statute.

statements prohibition to the judiciary "poses grave potential for abuse," because the government could misuse its power and indict opposing parties under Section 1001 to gain leverage in discovery disputes. Section 1001, however, applies only to knowing and willful falsehoods, not to mistakes or disagreements respecting discovery obligations. See *Bryson* v. *United States*, 396 U.S. 64, 69 (1969). Although government counsel could, hypothetically, pressure or harass an opponent with threats of prosecution under Section 1001, that same potential for abuse exists with respect to threats of prosecution for perjury, contempt, obstruction of justice, or other litigation-related crimes. In light of its experience, however, this Court presumes that prosecutors will act in good faith. *United States* v. *Mezzanatto*, No. 93-1340 (Jan. 18, 1995), slip op. 14-15; *Town Of Newton* v. *Rumery*, 480 U.S. 386, 397 (1987); *United States* v. *Goodwin*, 457 U.S. 368, 384 (1982). There is, accordingly, no warrant for reconsidering *Bramblett*'s conclusion that Section 1001 applies to all three branches of government.

II. THERE IS NO JUDICIAL FUNCTION EXCEPTION TO SECTION 1001

Petitioner argues (Pet. Br. 19-34) that Section 1001 cannot be applied to false statements that fall within the "judicial functions" of the courts. While every court that has considered the question has held that Section 1001 applies to the Judicial Branch, many of those courts have distinguished between a court's administrative functions and its adjudicative functions, and have held

that Section 1001 applies to the courts only when they are acting in an administrative capacity.[10]

That so-called "judicial function" exception to Section 1001 originated from dictum in *Morgan* v. *United States*, 309 F.2d 234 (D.C. Cir. 1962), cert. denied, 373 U.S. 917 (1963). In *Morgan*, the court of appeals upheld the conviction under Section 1001 of a layman who had falsely held himself out as an attorney in various court proceedings. The defendant argued on appeal against application of the statute to statements made within the Judicial Branch, contending that such application would criminalize traditional trial tactics. He claimed, for example, that the statute's false statement proscription would make a criminal offense out of a plea of "not guilty" or a lawyer's summation on behalf of a guilty client. 309 F.2d at 237. Responding to that concern, the court of appeals noted its belief that "neither Congress nor the Supreme Court [in *Bramblett*] intended the statute to include traditional trial tactics within the statutory terms 'conceals or covers up.'" *Ibid.* Section 1001's application to "traditional trial tactics" was not presented in *Morgan*, however, and the court held "only * * * that the statute does apply to the type of action with which appellant was charged, action which essentially involved the 'administrative' or 'house-

[10] See *United States* v. *Masterpol*, 940 F.2d at 763-766; *United States* v. *Holmes*, 840 F.2d at 248; *United States* v. *Abrahams*, 604 F.2d at 392-393; *United States* v. *Mayer*, 775 F.2d at 1388-1392; *United States* v. *Wood*, 6 F.3d 692, 694-695 (10th Cir. 1993). Other courts have expressed doubt respecting the validity of that distinction. See *United States* v. *Barber*, 881 F.2d at 350; *United States* v. *Poindexter*, 951 F.2d at 387.

keeping' functions, not the 'judicial' machinery of the court." *Ibid.*[11]

Although the court in *Morgan* did not hold that there is a "judicial function" exception to Section 1001, that court's statement that the statute should not be read to proscribe traditional trial tactics "has somehow flowered into [a] broad exception" that now shields from criminal sanctions defendants who knowingly and willfully lie to courts so long as the lie affects only the court's adjudicative functions. See *United States* v. *Mayer*, 775 F.2d at 1392 (Fairchild, J., concurring). Courts of appeals that recognize a "judicial function" exception have held that Section 1001 does not prohibit false statements to FBI agents acting under the auspices of a grand jury, *United States* v. *Wood*, 6 F.3d at 694-695; false or fictitious letters of recommendation to be considered at sentencing, *United States* v. *Masterpol*, 940 F.2d at 763-766; *United States* v. *Mayer*, 775 F.2d at 1392; or the submission of false receipts as evidence in a criminal proceeding, *United States* v. *Erhardt*, 381 F.2d at 175. At the same time, courts have upheld convictions under Section 1001 for giving a false name to a magistrate judge, *United States* v. *Holmes*, 840 F.2d at 248-249; *United States* v. *Plascencia-Orozco*, 768 F.2d 1074, 1075-1076 (9th Cir. 1984); filing a false performance bond in bankruptcy court, *United States* v. *Rowland*, 789 F.2d 1169, 1172 (5th Cir.), cert. denied, 479 U.S. 964

[11] The D.C. Circuit has since distanced itself from *Morgan*'s dictum, expressing "doubt that the 'traditional trial tactics' rationale of that case shields from criminal responsibility a defendant who knowingly makes a material false statement of fact in a judicial proceeding." *United States* v. *Poindexter*, 951 F.2d at 387 (refusing to create a parallel "legislative function" exception to the statute).

(1986); and making false representations on a statement of indigency, *United States* v. *Powell*, 708 F.2d 455, 457 (9th Cir. 1983), cert. denied, 467 U.S. 1254, rev'd on other grounds, 469 U.S. 57 (1984)—in each instance because the false statements were deemed to implicate only the administrative duties of the court.

In our view, the "judicial function" exception has no basis in the text or history of the statute, and finds no justification in policy. Correctly construed, Section 1001 applies to false statements made to the courts irrespective of the function they are then performing.

1. *There is no "judicial function" exception in the text of Section 1001.* The language of Section 1001 leaves no room for exempting false statements made in the course of a court's judicial functions. The text of the statute reaches false statements made (i) "in *any* matter" (ii) "within the jurisdiction" (iii) "of *any* department or agency." 18 U.S.C. 1001 (emphasis added). As explained above, the Judicial Branch is a "department" within the meaning of the statute. And a case or controversy is the quintessential sort of "matter" that comes "within the jurisdiction" of the Judicial Branch. As this Court has explained, the term "jurisdiction" is not to be given "a narrow or technical meaning" for purposes of Section 1001, *Bryson* v. *United States*, 396 U.S. at 70, but is instead understood to embrace "all matters confided to the authority of an agency or department," *Rodgers*, 466 U.S. at 479. Even in its narrowest meaning, however, the concept of "jurisdiction" extends to a court's "power to interpret and administer the law." *Id.* at 480.

In adopting the judicial function exception, some courts have reasoned that, if such a gloss on the statute were not applied, Section 1001 "could interfere with, if not swallow up, the pre-existing statutory scheme

[covering perjury offenses]." *United States* v. *Masterpol*, 940 F.2d at 766. See also *United States* v. *Mayer*, 775 F.2d at 1390; *United States* v. *Erhardt*, 381 F.2d at 175.[12] But there is nothing unusual about the application of more than one criminal statute covering the same conduct; in such situations, unless Congress clearly expresses a contrary intent, the government may charge a violation of any applicable statute. See *United States* v. *Batchelder*, *supra*. Nor is the "judicial function" exception needed to preserve "the time-honored and now necessary formality of requiring witnesses to testify under oath." Pet. Br. 31, quoting *Friedman* v. *United States*, 374 F.2d 363, 367 (8th Cir. 1967). The taking of the oath in judicial proceedings serves an independent function in reminding individuals of their obligation to tell the truth, and in serving notice that false statements subject witnesses to criminal prosecution.

Moreover, Section 1001 reaches many false statements made in the judicial context that are not covered by the statutory proscriptions against perjury. Not all statements made in judicial proceedings are sworn. For example, as the court of appeals observed, Pet. App. 13, "none of [petitioner's] false statements * * * was made under oath and therefore none could be prosecuted as perjury." Similarly, the perjury statutes do not cover false statements by attorneys made in the course of judicial proceedings, or the submission of unsworn

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[12] The court in *Erhardt* suggested that application of Section 1001 to adjudicative proceedings "would undermine the effectiveness of the two-witness rule." 381 F.2d at 175. While the traditional two-witness rule has been applied under 18 U.S.C. 1621, Congress has enacted a separate statute that prohibits perjury in judicial proceedings and that does away with the two-witness rule. See 18 U.S.C. 1623(e).

documentation, such as the false or fictitious letters of recommendation submitted to the sentencing judges in *United States* v. *Masterpol*, *supra*, and *United States* v. *Mayer*, *supra*. Because Section 1001 only partially overlaps with the perjury statutes, the existence of those parallel prohibitions does not justify the judicial function exception.

2. *The legislative history does not support the exception.* Nothing in the legislative history of Section 1001 supports a restriction of the statute to non-adjudicative judicial functions. As this Court found in *Bramblett*, 348 U.S. at 507, and reiterated in *Rodgers*, 466 U.S. at 481, the pertinent committee reports and floor debates contain no hint that the scope of the statute was to be limited "in any way." To the contrary, the legislative history affirmatively indicates that Congress intended the statute to cover *all* of the authorized functions of the federal departments and agencies. *Rodgers*, 466 U.S. at 481-482; *Gilliland*, 312 U.S. at 93.

When Congress intended to restrict the reach of the false statement statute to statements made in particular contexts, it defined those contexts expressly. For example, the Act of March 2, 1863, ch. 67, § 1, 12 Stat. 696, specified that false statements were punishable only if they furthered "the purpose of obtaining, or aiding in obtaining, the approval or payment of [a false] claim." The 1918 amendment of the statute added the proscription against false statements made "for the purpose * * * of cheating and swindling or defrauding the Government of the United States." Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015. In the 1934 revision, however, Congress deleted any requirement about the purpose of the statement, see *Bramblett*, 348 U.S. at 506-508, and substituted the broad "in any matter" language. 48 Stat. 996. If Congress had intended at that time to restrict the

scope of the statute to false statements made with respect to non-adjudicative matters, it could have stated that limitation explicitly.

3. *The exception is inconsistent with the uniform application of Section 1001.* The so-called "judicial function" exception to Section 1001 conflicts with this Court's teaching that Section 1001 does not draw distinctions among the authorized functions of departments and agencies. In *United States* v. *Gilliland*, this Court rejected the view that Section 1001, as amended in 1934, continued to require a showing a pecuniary loss (see note 5, *supra*), and held instead that it encompassed as well false statements on matters within departments' regulatory functions. The Court reasoned that the purpose of the amended statute was broadly "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described," 312 U.S. at 93, regardless of the nature of those "authorized functions."

In *United States* v. *Rodgers*, the Court once again declined to construe Section 1001 as distinguishing among the authorized functions of governmental agencies. In that case, the defendant was charged with making false crime reports to the FBI and the Secret Service. The Court rejected as "unduly strained," 466 U.S. at 479, the view that Section 1001 is limited to false statements to agencies that have the power to adjudicate rights, establish regulations, and make final or binding determinations, *id.* at 477-478. Instead, the Court held that Section 1001 covers "all matters confided to the authority of an agency or department." 466 U.S. at 479. The Court explained that the only "differentia[tion]" permitted by the statutory language is between "the official, authorized functions of an agency or department

[and] matters peripheral to the business of that body." *Ibid.*

The Court's refusal to draw functional lines within Section 1001 is consistent with its general broad approach to the provision. In *Bramblett*, the Court held that the statute calls for an "unrestricted interpretation." 348 U.S. at 509. And in *Bryson*, the Court rejected efforts to read the word "jurisdiction" as a term of art with a limited meaning, and held that a "statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under § 1001," even if the statutory basis were constitutionally infirm. 396 U.S. at 70-71. Contrary to petitioner's novel suggestion—that broadly drafted statutes should be construed narrowly (Pet. Br. 29)—this Court has given Section 1001's expansive language its natural scope and has rejected attempts to impose judge-made limits on its application.

4. *The exception is not justified by policy reasons.* Petitioner relies heavily on policy concerns, arguing (Pet. Br. 23-25) that application of Section 1001 to the courts "is both unjust and absurd," because such application would penalize defendants' exercise of constitutionally protected rights and "[subject] traditional trial practices * * * to revolutionary change." Even if petitioner's policy arguments were persuasive, they would not affect the result in this case. As the Court explained in *Rodgers*, "[r]esolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress." 466 U.S. at 484. In any event, petitioner's policy concerns about applying Section 1001 to the courts' judicial functions are unfounded.

a. Petitioner's principal claim (Pet. Br. 23-27) is that it would disrupt traditional trial tactics to punish the

making of willful and knowing false statements of fact in adjudicative proceedings. Section 1001 does not penalize traditional trial tactics, however, because such tactics have never included the making of intentionally false statements of fact. Indeed, rather than protecting any legitimate form of litigation tactics, the "judicial function" exception has been applied by the lower courts to overturn convictions for submitting false or fictitious letters of recommendation to influence sentencing (*Mayer* and *Masterpol*), for making false statements to FBI agents acting under the auspices of a grand jury (*Wood*), and for submitting false receipts as evidence in criminal proceedings (*Erhardt*).

Nor, contrary to petitioner's assertion (Pet. Br. 23-25), does the application of Section 1001 to criminal proceedings impinge on the exercise of a defendant's constitutionally protected rights. The prohibition against making knowingly false statements of fact does not impair the presumption of innocence or inhibit vigorous efforts to challenge the government's case. As petitioner apparently concedes, Pet. Br. 24, a plea of "not guilty" does not come within Section 1001, because it is not a statement of fact. Rather, it is a formal notice that the defendant will require the government to carry its burden to establish guilt beyond a reasonable doubt. Nor does a good faith motion to suppress or exclude evidence fall within Section 1001. The statute prohibits only false statements of *fact*. Because legal arguments are not facts, the statute does not reach questionable (or even frivolous) contentions of law.[18] Finally, nothing in

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[18] Nor, contrary to the concern expressed in *Morgan*, 309 F.2d at 237, does a failure to introduce evidence, a motion to suppress, or a hearsay objection constitute "conceal[ment]" under Section 1001. To prove unlawful concealment of material facts under the

Section 1001 inhibits legitimate zealous advocacy. The provision's ban on lying does not preclude a forceful challenge by defense counsel to the probity or sufficiency of the government's evidence. And the Sixth Amendment right to effective assistance of counsel in criminal cases does not afford defense attorneys the right to lie on behalf of their clients. See *Nix* v. *Whiteside*, 475 U.S. 157, 166 (1986) (counsel's duty to his client under the Sixth Amendment "is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth").

In any event, this case does not involve constitutionally protected conduct or mere zealous advocacy. Petitioner has been convicted of deliberately lying in formal pleadings to the bankruptcy court. Petitioner does not contend that the deliberate submission of false pleadings is a legitimate trial tactic. Instead, petitioner argues that his "filings fall within [traditional] practices," Pet. Br. 27, and that Section 1001 should not be applied to general denials (or, he says, to his more specific denials and averments), because in his view general denials—like a plea of "not guilty"—merely "put at issue" an entire cause of action. Pet. Br. 24. That argument does not hold true for general denials, and in any event would not assist petitioner.

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statute, the government must first establish a duty to disclose. See, *e.g.*, *United States* v. *Kingston*, 971 F.2d 481, 489 (10th Cir. 1992); *United States* v. *Richeson*, 825 F.2d 17, 20 (4th Cir. 1987); *United States* v. *Murphy*, 809 F.2d 1427, 1431 (9th Cir. 1987); *United States* v. *Tobon-Builes*, 706 F.2d 1092, 1099 (11th Cir. 1983). A defendant has no legal duty to disclose unfavorable evidence. And it cannot be seriously suggested that counsel engages in "concealment" by objecting to the introduction of evidence on the ground that it is inadmissible.

As petitioner recognizes (Pet. Br. 25), although the common law practice of pleading general denials was retained by the drafters of the Federal Rules of Civil Procedure, a party may use a general denial under Rule 8(b) only if that party can "in good faith deny all the averments of the opposing party's pleadings." 2A James Wm. Moore & Jo Desha Lucas, *Moore's Federal Practice* ¶ 8.23, at 8-149 (1994); *id.* at ¶ 8.21, at 8-144; 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1265, at 402 (2d ed. 1990). In addition, "[a] party interposing a general denial * * * is subject to the obligations of honesty in pleading set forth in Rule 11." *Federal Practice and Procedure*, *supra*, § 1265, at 402.[14] Although, as petitioner points out (Pet. Br. 25), neither the requirement of good faith nor Fed. R. Civ. P. 11 "bind[s] a defendant to his, her, or its responses for all time," or prohibits "averments of insufficient information or knowledge upon which to form a belief as to the truth of the complainant's allegations," both good faith and Rule 11 preclude the submission of knowingly false denials, general or otherwise. The fact that petitioner's denials and responses were "subject to further investigation, proof and judicial factfinding," Pet. Br. 25, provides no justification for his presentation of intentional lies rather than good faith responses. As the court of appeals noted, "whether or not it is a 'traditional trial tactic' to answer a complaint with affirmative

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[14] The commentators have recognized that "situations in which the complaint can be completely controverted are quite rare, which means that an answer consisting of a general denial will be available to a party acting in good faith only in the most exceptional circumstances." *Federal Practice and Procedure*, *supra*, § 1265, at 403; *Moore's Federal Practice*, *supra*, ¶ 8.23, at 8-149 ("A party will seldom be able to use a general denial in good faith.").

falsehoods, we need not sanction such action and therefore will not create an exception so broad as to include [petitioner's] conduct." Pet. App. 4 n.3.

b. The absence of any compelling policy basis for the "judicial function" exception is revealed by the fact that Section 1001 is applied to adjudicative proceedings in the Executive Branch. Many executive departments and agencies conduct quasi-judicial hearings to adjudicate matters falling within their jurisdiction.[15] If a judicial function exception were warranted because of concerns unique to adjudication, the exception ought to apply equally to adjudicative proceedings by executive departments and agencies. See *United States* v. *Mayer*, 775 F.2d at 1390 n.2. Yet the courts have routinely applied Section 1001 to false statements made in the context of agency hearings. See, *e.g.*, *United States* v. *Flint*, No. 92-50554, 1993 WL 169067 (9th Cir. May 19, 1993) (informal DEA hearing); *Leitman* v. *McAusland*, 934 F.2d 46 (4th Cir. 1991) (Department of Defense debarment hearing); *United States* v. *Krause*, 507 F.2d 113 (5th Cir. 1975) (NLRB formal hearing); *Stein* v. *United States*, 363 F.2d 587 (5th Cir.) (Tax Court), cert. denied, 385 U.S. 934 (1966). The courts' failure to apply the functional distinction across the board cuts against petitioner's argument that a judicial function exception is necessary to safeguard legitimate litigation tactics. Cf. *Rodgers*, 466 U.S. at 481 n.2 ("Unless one is simply

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[15] "[T]he Federal Government has a corps of administrative law judges numbering more than 1,000, whose principal statutory function is the conduct of adjudication * * *. They are all *executive* officers. 'Adjudication,' in other words, is no more an 'inherently' judicial function than the promulgation of rules governing primary conduct is an 'inherently' legislative one." *Freytag* v. *Commissioner*, 501 U.S. at 910 (Scalia, J., concurring).

to read the phrase '*any* department or agency of the United States' out of the statute, there is no justification for treating the investigatory activities of one agency as within the scope of § 1001 while excluding the same activities performed by another agency.").

c. Because the "judicial function" exception has no foundation in the language or history of Section 1001, courts have applied it in varying and often conflicting ways. For instance, as one court noted, "[w]hether a statement or a proceeding is 'adjudicative' or 'administrative' often may be a close question." *Holmes*, 840 F.2d at 248. While the Fourth Circuit has concluded that false statements regarding identity made to a magistrate judge at a plea hearing fall within the court's administrative sphere, see *United States* v. *Holmes*, 840 F.2d at 248-249, the Fifth Circuit has determined that false statements regarding identity made to a magistrate judge at a bail hearing fall on the "judicial function' side of the line, *United States* v. *Abrahams*, 604 F.2d at 393. Also illustrative is the disagreement among the courts of appeals over whether the exception ought to apply to false statements by nonparties. Compare *United States* v. *Wood*, 6 F.3d at 695 (exception shields false statement by potential witness) with *United States* v. *Barber*, 881 F.2d at 350 (to the extent exception is valid, it would not shield false statements made to sentencing judge in another defendant's case). Although the many difficulties in applying the exception would not justify its rejection if Congress had mandated it in the statute, the absence of any textual basis or coherent policy rationale to guide the development of a "judicial function" exception argues strongly against its acceptance.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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